QUESTIONS PRESENTED

1. Does the issuance of internationally-negotiable bonds by the Republic of Argentina and its central bank constitute a "commercial transaction" under the Foreign Sovereign Immunities Act?

2. Are Argentina and its central bank precluded from raising an issue in their petition for certiorari which they did not raise in the courts below?

3. Does the failure of the Republic of Argentina and its central bank to make contractually-required interest and principal payments in New York City in U.S. dollars constitute a direct effect in the United States under the Foreign Sovereign Immunities Act?

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No. 91-763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

vs.

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The respondents own $1,330,000 of bonds issued by the petitioners in 1982. The petitioners have defaulted on these bonds (the "Bonods"), and respondents seek payment, approximately $2,000,000 including accrued interest.

The respondents are three foreign corporations: Weltover, Inc. and Springdale Enterprises, Inc. are organized under the laws of Panama, and Bank Cantrade, A.G. is organized under

the laws of Switzerland. There are no corporations to be listed pursuant to Sup. Ct. R. 29.1. The petitioners are the Republic of Argentina and its central bank.

The Bonods require scheduled payments of interest and principal in United States dollars to be made in New York City or other international financial centers at the request of the bondholders. The Bonods are internationally negotiable except to Argentine citizens or residents.

Before May 1986 petitioners had made scheduled interest payments to the respondents in the United States. In May 1986 the petitioners stopped paying and offered bondholders substitute instruments, which respondents refused. In 1989 respondents demanded payment (in New York City) of all principal and accrued interest, petitioners refused, and respondents brought this action for breach of contract in the United States District Court for the Southern District of New York under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), 1602-1611 (the "FSIA").

Respondents differ with petitioners' presentation of the facts in a few respects: petitioners should have noted that the Bonods are internationally negotiable; petitioners erroneously imply that their unilateral decision to stop payments was the product of international negotiations [*cf.* Petition, p.6, lines 7-11, and the Second Circuit's opinion, Appendix, 4a, lines 24-29]; the petitioners characterize the purported significance of what the Bonods do not include when the Bonod terms are not part of petitioners' appendix; and we maintain that petitioners' recitation of Argentina's sad economic history is utterly irrelevant to these proceedings.

Insofar as this court deems Argentina's economic history to be an appropriate consideration, the Second Circuit's summary of facts in the "Background" section of its opinion (Appendix, 2a-5a) is both comprehensive and non-partisan, and we respectfully refer the court thereto.

The district court and the Second Circuit found that subject matter jurisdiction exists under § 1605(a)(2) of the FSIA,

specifically that (i) petitioners' issuance of the Bonods was a commercial activity under § 1603(d) of the FSIA and (ii) petitioners' breach of their promise to pay their obligations in New York City was a legally significant act which created a direct effect in the United States.

We do take issue with some of petitioners' characterizations of the methods and content of the reasoning in the courts below, particularly because petitioners include this as part of their statement of the case rather than in argument. We discuss these characterizations in the body of our argument, although the opinions of the courts ultimately speak for themselves.

THE FOREIGN SOVEREIGN IMMUNITIES ACT

The FSIA grants immunity from actions in the United States to foreign states and their instrumentalities subject to certain exceptions. By far the broadest exception is for a state's "commercial activity". 28 U.S.C. § 1605(a)(2)

More particularly, a foreign state is subject to suit under the FSIA regarding "an act outside the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.*, third clause This provision lies at the heart of this action.

A "commercial activity" includes "a particular commercial transaction or act" the character of which "shall be determined by reference to the nature of the course of conduct or particular transaction or act rather than by reference to its purpose." 28 U.S.C. § 1603(d)

The last sentence of Section § 1603(d) is the touchstone of the FSIA. Without the nature/purpose distinction, virtually every transaction of a foreign state would be immune, an element of some public purpose. It is irrelevant "that goods or services to be procured through a contract are to be used for a public purpose. . . . Such contracts are to be considered commercial contracts, even if their ultimate object is to further a public function." Report of the House of Representatives, #94-1487 (94th

Cong., 2d Sess. 1976, hereafter the "House Report"), p.16 The House Report also defines borrowing money as a commercial activity under the FSIA. *Id.*

The FSIA contains no indication of any limitation based on the citizenship of the plaintiff; a foreign plaintiff may prosecute such an action so long as it satisfies the substantive standards of the FSIA. *Verlinden, B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490-1 (1983)

SUMMARY OF REASONS FOR DENYING THE PETITION

Commercial Activity. The circuits have consistently determined that a transaction is commercial under the FSIA if a private party can engage in the type of conduct sued upon. Petitioners issued bonds and promised to repay borrowed money, an activity in which private parties regularly engage, an activity described by the district court as "quintessentially commercial" (Appendix, 21a), and by the Second Circuit as "clearly commercial" (Appendix, 10a). Petitioners' argument that their purpose in issuing the Bonods be determinative contradicts the explicit language of the FSIA.

Direct Effect in the United States. The court should not consider an issue which petitioners now raise for the first time: the perceived difference between the Second Circuit and other circuits in determining what constitutes a direct effect in the United States. Substantively, the circuits have by themselves developed a collegial understanding that a direct effect occurs if a foreign sovereign could expect its acts to have a significant impact in the United States. The decisions which find that a direct effect has occurred would not be altered by applying any other circuit's expressed standard. Petitioners' breach of its agreement to pay respondents in New York had a direct, substantial, and foreseeable effect in the United States; thus, petitioners' issue is moot because all the factors for a finding of direct effect are present under any test.

I.

The circuits agree (a) as to the test for a "commercial activity" under the FSIA and (b) that the purposes of the foreign sovereign are irrelevant to that determination; under that test the issuance of the Bonods is a commercial activity.

(a) The basic test of a commercial activity under §§ 1603(d) and 1605(a)(2) is recognized throughout the circuits.

If a private person can perform the type of activity sued upon, it is "commercial activity" under the FSIA. *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 309 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Velidor* v. *L/P/G/ Benghazi*, 653 F.2d 812, 817, n.7 (3d Cir. 1981) [citing *Texas Trading, supra*], *cert. dismissed*, 455 U.S. 929 (1982); *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985); *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988); *Rush-Presbytrian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 580 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989); *Meadows* v. *Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied.*, 484 U.S. 976 (1987); *Practical Concepts, Inc.* v. *Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C. Cir. 1987) [citing *Texas Trading, supra*].

Further, the courts are completely consistent in limiting their examination to "the *specific* conduct at issue. . . rather than the broad program or policy of which the individual transaction is a part." *Rush, supra*, 877 F.2d at 580, emphasis by the court; *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980) [Section 1605(a)(2) focuses on "particular conduct" giving rise to the claim in question.]

Specifically, a sovereign's financial instruments have been regularly held to be commercial activity under the FSIA. The rule is pristine in its simplicity: Promulgation of economic policy is sovereign; implementation of economic policy through issuance of debt instruments is commercial. *West* v. *Multibanco*

Comerex, S.A., 807 F.2d 820, 825 (9th Cir. 1987) [Issuing certificates of deposit is commercial activity.]; *Callejo, supra*, 764 F.2d at 1109-10 [Issuing certificates of deposit is commercial activity.]; *Texas Trading, supra*, 647 F.2d at 310 [Letters of credit are commercial activity.]

To find this commerciality "self-evident" one need recognize only that a bond is a very traditional contract for a very valuable service, the use of money. *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991) [Negotiable promissory notes are commercial.] Just as it is commercial activity for a foreign consulate to rent space, *Joseph* v. *Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), it is commercial activity for petitioners to rent money.

Both the district court and the Second Circuit found that petitioners' issuing public debt instruments – the Bonods – is an activity which private parties regularly do and, hence, commercial activity under the FSIA. (Appendix, 21a, 9a-10a)[1]

Nevertheless, petitioners claim that FSIA decisions are "difficult to reconcile" (Petition, p.11), but a careful reading of petitioners' authorities shows that no such conflict exists.

For example, *City of Englewood* v. *Socialist People's Libyan Arab Jamariya*, 773 F.2d 31 (3d Cir. 1985) and *MacArthur Area Citizens Ass'n.* v. *Republic of Peru*, 809 F.2d 918, *modified on other grounds*, 823 F.2d 606 (D.C. Cir. 1987), are not about the purchase of property – as petitioners claim – but, rather, the use of property as a foreign mission.

City of Englewood cites the Fourth Circuit's holding that the purchase of property for ultimate diplomatic use is a commercial transaction under the FSIA, 773 F.2d at 36. "Consequently [the purchasor] would be subject to suit under

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[1] Petitioners' implication that there is some internal inconsistency in the district court's opinion (Petition, p.7, lines 3-8) can be explained only as an excess of zeal. It is best resolved by reading the entire footnote which the Petition quotes in part. (Appendix, 21a, n.6)

§ 1605(a)(2) by the vendor if a dispute arose over the sale." *United States* v. *County of Arlington*, 669 F.2d 925, 934 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982) *MacArthur* contrasts the non-commercial activity of operating a chancery with the commerciality of "a contract to make repairs on an embassy building." 809 F.2d at 920, citing House Report, p.16 The circuits' accord is the rule, not the Petition's representation of disarray.[2]

Notwithstanding petitioners' doubts, the circuits have a clear standard for determining commercial activity.

(b) The purpose for which petitioners issued the Bonods is not relevant in determining whether or not petitioners engaged in commercial activity.

In the end, petitioners' sole argument is the purpose for which they issued the Bonods, an argument that conflicts with the very language of § 1603(d). The district court recognized this (Appendix, 21a), as did the Second Circuit (Appendix, 10a). On the other side of their purpose coin, petitioners argue that the Bonods are somehow not garden variety public debt.

The circuits regularly exclude consideration of a sovereign's purpose in determining what constitutes a commercial activity. *e.g.*, *Meadows*, *supra*, 817 F.2d at 523, citing House Report, p.16, "The term 'commercial activity' applies to an agreement that might be made by a private person, nothwithstanding the fact that the goods or services to be procured through the contract are to be used for a public purpose." *See also*, *Segni* v. *Commercial Office of Spain*, 835 F.2d 160, 164 (7th Cir. 1987) [Contract with individual to promote Spanish wines is commercial,

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[2] Petitioners in fact emphasize the circuits' consistency in citing *MOL, Inc.* v. *People's Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) (Petition, p.12). [A license to export a nation's natural resources is not commercial activity because a private party could not make such an agreement.] Also unremarkable is petitioners'authority that the commercial activity exception to sovereign immunity cannot be used to circumvent immunity specifically preserved against libel actions in 28 U.S.C. § 1605(a)(5)(B). *Gregorian* v. *Isvestia*, 871 F.2d 1515, 1520-1 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989)

albeit the purpose is to increase Spanish exports and thus reduce unemployment in Spain.]; *Rush*, *supra*, 877 F.2d at 580 [Hospital's contract with Greece to perform kidney transplants on Greek citizens is commercial; to view it as "one small part" of Greek health care system goes to purpose rather than nature.]

On this issue petitioners rely solely upon *DeSanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985) as their basis for certiorari. There the wife of Anastazio Somoza's defense minister attempted to prematurely redeem a certificate of deposit in U.S. dollars held in a Nicaraguan bank, just as the regime toppled. When the revolutionary government refused to pay on the check issued to Sra. DeSanchez through a New Orleans bank, the Fifth Circuit held that this was not commercial activity, in part based on a consideration of the purpose of Nicaragua's post-Somoza foreign exchange regulations. *DeSanchez*, *supra*, 770 F.2d at 1393

No reported decision in any court relies on *DeSanchez* in finding activity not commercial under the FSIA. Courts reviewing the result have severely restricted its scope, ["[T]o give the 'commercial exception' its proper scope, *DeSanchez* must be limited to the extraordinary circumstances before the court in that case." *Rush*, *supra*, 877 F.2d at 579, n.5] or refused to follow it altogether ["The court is confident that the Fifth Circuit would have ruled otherwise under less stressful political conditions." *Chisholm* v. *Bank of Jamaica*, 643 F.Supp. 1393, 1400, n.5 (S.D.Fla. 1986)].[3]

The teleological inquiry of the Fifth Circuit's dicta in *DeSanchez* is undeniably profound in its examination of how a court resolves a perceived statutory ambiguity. However, "When the nature of an act is transparent by reference merely to the type

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[3] There is good argument that *Chisholm* reflects the law of the Fifth Circuit, not *DeSanchez*. In a recent case, a Fifth Circuit district court relied on *Chisholm*, *Texas Trading*, *supra*, and *Meadows*, *supra*, in determining commercial activity. *DeSanchez* is not mentioned. *Hester International Corp.* v. *Federal Republic of Nigeria*, 681 F.Supp. 371, 383 (N.D.Miss. 1988), *affirmed on other grounds*, 879 F.2d 170 (5th Cir. 1989)

of activity, the purpose should not bear on the outcome." (Appendix, 9a)

Finally petitioners, who substituted themselves as debtors through the Bonods, argue that the Bonods are not "traditional" public debt because the petitioners did not receive any "customary compensation". (Petition, p.13) In other words, petitioners' purpose was not profit-driven, an issue of no consequence in the determination of commercial activity. *Joseph, supra*, 830 F.2d at 1024 Again, issuance of the Bonods is no less commercial because the petitioners were forced to act in response to a "perceived credit crisis". (Petition, p.13) A country might not like to spend its foreign exchange to buy a million pairs of boots for its army, or a billion tons of wheat to feed its populace, but such contracts would surely be commercial activities, even if there were a threat of invasion or famine. *Texas Trading, supra*, 647 F.2d at 310 To use petitioners' word, a contract to pay back borrowed money is truly "archetypical" commercial conduct. (Petition, p.14, n.14)

Petitioners seek no less than a third review of a position which has been found without merit by two courts, a position whose reasoning has been rejected by courts across the country, a position which conflicts with the very language of the FSIA.

II

This court can disregard any difference between the circuits as to their standards for determining "direct effect in the United States" because (a) the petitioners raise it here for the first time and (b) under any test petitioners' breach of their promise to pay in New York constitutes such a direct effect.

(a) Petitioners' cannot now for the first time raise an issue they never argued below.

Section 18 of the Restatement (Second) of the Foreign Relations Law of the United States (1965, superseded) (hereafter "Section 18") provides that the standard for prescribing controlling law

should be based on whether the sovereign's acts were direct, foreseeable and substantial. The House Report, p. 19, suggests that determinations of direct effect be made "consistent with principles" of Section 18, although Congress did not incorporate that language into the FSIA. As this section discusses prescription rather than jurisdiction, the Second Circuit has found the suggestion to be "a bit of a non sequitur", *Texas Trading, supra*, 647 F.2d at 311, and it has not overtly used those standards while other circuits have. Petitioners seek to make this perceived difference an issue before this court.

Prior to the the Second Circuit's decision petitioners made no suggestion that any difference in the Second Circuit's test was a question of this litigation. They merely stated the test in a footnote to the Second Circuit and moved on. (In all fairness to petitioners, they do not allege that they did raise the issue earlier.)

A question not raised in the court of appeals is not properly before this court. *Delta Air Lines* v. *August*, 450 U.S. 346, 362 (1981) This court has occasionally relaxed the rule for exceptional cases, *Heckler* v. *Campbell*, 461 U.S. 458, 469, n.12 (1983), citing *McGoldrick* v. *Compagnie Generale Transtlantique*, 309 U.S. 430, 434 (1940), but petitioners have not offered any suggestion or evidence to indicate that this case is "exceptional".

Petitioners did not consider this issue "special and important" enough to raise below, Sup.Ct.R. 10.1, and they should not be permitted to pursue a mere afterthought in this court.

(b) Petitioners' breach created a direct effect in the United States under any test.

The opinions of the circuits harmonize on this interpretation of the third clause of § 1605(a)(2): There is a direct effect in the United States if the foreign sovereign could reasonably expect its actions to to cause some significant impact here. *Meadows, supra*, 628 F.Supp. 599, 604-05 (N.D.Cal. 1986), 817 F.2d at 523 [Even where the contract does not specifically provide for payment in the United States, there is a direct effect

if the sovereign defendants, "could reasonably have expected that payment would be called for at a bank in the United States."]; *Zedan* v. *Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C.Cir. 1988) [Direct effect is created when sovereign causes a legally significant act to occur in the United States, as in *Texas Trading, supra*, and *Transamerican S.S. Corp.* v. *Somali Democratic Republic*, 767 F.2d 998 (D.C.Cir. 1985).]; *America West Airlines, Inc.* v. *GPA Group Ltd.*, 877 F.2d 793, 799 (9th Cir. 1989) [Finding direct effect in *Meadows* is consistent with narrow reading of *Texas Trading* since defendant could expect significant effect in the United States, citing *Zedan, supra*.]; *International Housing, Inc.* v. *Rafidain Bank Iraq*, 893 F.2d 8, 12 (2d Cir. 1989) [Plaintiff's payment to a sovereign in New York, which was not a contractual guaranty, did not create direct effect.]; *Stena Rederi AB* v. *Comision de Contratos de Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 390-91 (5th Cir. 1991) [Plaintiff's voluntary guaranty through New York bank is not a defendant's act creating direct effect in the United States.]

The circuits may express their direct effect standards differently, but that is not the point. The authorities which find a direct effect in the United States would not be changed by applying another expressed standard. The opinions in *America West Airlines, Zedan, both supra*, and *Weltover* itself show that the circuits have worked their own way toward a common-sense blending of tests. The law has developed not by decree from above but through the circuits' collegial respect for one another. More significantly, petitioners do not attempt to demonstrate that any other circuit using any other test would have decided this case differently.

The essence of the Second Circuit's opinion on the substance of petitioners' acts is petitioners' breach of their contract – the Bonods – to pay respondents in New York City in U.S. dollars. Payment in New York constituted 100% of performance: the respondents or their predecessors-in-interest had long ago completed their lending function. Petitioners' failure to credit respondents accounts in New York is the "legally significant act"

which caused a direct effect in the United States. (Appendix, 14a, lines 16-23, citing, *n.b.*, *Zedan*, *supra*, 849 F.2d at 1515); *America West Airlines*, *supra*, 877 F.2d at 799; *Antares Aircraft, L.P.* v. *Federal Republic of Nigeria*, 1991 WL 219088 (2d Cir.) [*Weltover* requires a legally significant event to occur in the United States. By itself, financial loss by an American partnership is not direct effect.][4]

Petitioners' failure to pay as promised in New York was the "direct causal connection" to respondents' financial loss. *Gilson* v. *Republic of Ireland*, 682 F.2d 1022, 1027, n.22 (D.C.Cir. 1982) An effect is "direct" when there is no intervening factor. *Upton* v. *Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C. 1978), *affirmed mem.*, 607 F.2d 494 (D.C.Cir. 1979) The sovereign's foresight is specifically an element of the test for personal jurisdiction enunciated in *Texas Trading:* No FSIA case can proceed without such a finding. 647 F.2d at 314 Petitioners agreement to pay the respondents in U.S. dollars into an American bank "surely made an action for breach of that obligation in the United States foreseeable." (Appendix, 27a)

In short, petitioners' acts were found to be substantial, direct, and foreseeable. Petitioners' breach of its promise to pay in New York was a legally significant act.

Petitioners forged the chain of events which brings them to suit in New York. No matter the terms one uses to define the test – and we are convinced that there is no subtantive difference among the circuits – the petitioners' breach created a direct effect in the United States under § 1605(a)(2). For this court's purposes, petitioners' argument on this subject is moot.

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[4] In a most unfortunate choice of expression, petitioners assert that the Second Circuit "substituted" public policy as the basis for its decision. (Petition, Statement of the Case, p.8, lines 27-29) In fact, the Second Circuit first decided that petitioners created a direct effect in the United States and only then considered public policy in considering an additional issue, whether Congress would have wanted an American court to hear this case. (Appendix 14a) This court can easily confirm which exposition of the opinion is accurate.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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